IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

EDWARD A. BRANSTAD and MONROE BRANSTAD, Plaintiffs, vs. ANN VENEMAN, Secretary of the United States Department of Agriculture, Defendant.	No. C 01-3030-MWB **MEMORANDUM OPINION AND ORDER REGARDING DEFENDANT'S MOTION TO RECONSIDER**

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This matter comes before the court pursuant to defendant USDA's June 29, 2001, motion to reconsider this court's June 4, 2001, order which granted the plaintiffs' request for a preliminary injunction and the June 5, 2001, preliminary injunction issued accordingly. *See Branstad v. Veneman*, ___ F. Supp. 2d ___, 2001 WL 630194 (N.D. Iowa June 4, 2001). The preliminary injunction enjoined enforcement action by the USDA against the plaintiffs

for their alleged non-compliance with the Food Security Act of 1985 §§ 1201, 1221-23, 16 U.S.C. §§ 3801, 3821-24, commonly known as "Swampbuster." The USDA now contends that newly discovered evidence establishes that the preliminary injunction should be reconsidered and denied. The plaintiffs, Edward and Monroe Branstad, resisted the USDA's motion to reconsider on July 12, 2001.

I. BACKGROUND AND ARGUMENTS

In its motion to reconsider, the USDA contends that its counsel has now received a copy of the administrative record underlying these proceedings, which was not available at the time the parties argued the merits of the Branstads' motion for a preliminary injunction. One part of that record is a "Timeliness Analysis" prepared by Diane L. Moon, Hearing Technical Assistant for the National Appeals Division (NAD), which consists of the following:

> The adverse decision letter from FSA was dated November 2, 2000. This letter provided the correct address for NAD.
>
> NAD received a complete request for an appeal on January 16, 2001, postmarked January 12, 2001. In this correspondence, the participant's attorney made reference to a previously submitted request.
>
> NAD responded on January 18, 2001, requesting documentation the request had been submitted within the 30 days.
>
> The participant's attorney responded on January 23, 2001. The attorney enclosed a copy of the correspondence submitted previously; three copies of Authorizations for Representation, along with a cover letter with no mention or indication of an appeal request on any of the documents. Also noted is the attorney's use of *2909* Purdue Road, instead of 8909.
>
> There was no documentation provided that verifies a valid and timely appeal request.

> There were 64 days used.
>
> The request was not submitted within the prescribed time frames as required by *Title 7 of the Code of Federal Regulations* (7 CFR), Parts 11.5 and 11.6. The request for appeal is deemed not timely.

Defendant's Motion To Reconsider, Exhibit A (Timeliness Analysis) (emphasis in the original).

The USDA contends that the Timeliness Analysis establishes an additional rationale for denying as untimely the Branstads' appeal request, despite their assertion of "extenuating circumstances," because it shows that the Branstads' first appeal request, which purportedly was never received by the NAD, was mailed to the wrong address. The USDA acknowledges that the Branstads' follow-up letter of January 12, 2001, concerning the status of their appeal, was also mailed to the wrong address, but was "inexplicably" received by the NAD. However, the USDA contends that, under pertinent regulations, a notice of appeal must be mailed to the correct address to be timely. Where the newly discovered evidence shows that the Branstads or their counsel were negligent in mailing the notice of appeal to the wrong address, the USDA contends that it is much less likely that the court would have concluded that the NAD's denial of the Branstads' request for consideration of their untimely appeal was arbitrary and capricious. Thus, the USDA's argument continues, the Branstads do not have the requisite likelihood of success on the merits of their claim that denial of their administrative appeal was arbitrary and capricious to sustain the preliminary injunction.

In their resistance to the USDA's motion to reconsider, the Branstads point out that the Timeliness Analysis upon which the USDA now relies merely notes the mistake in the mailing address of the Branstads' first notice of appeal, and concludes that there is no documentation verifying a valid and timely appeal request, but does not address whether the mistake in the mailing address was or was not itself an "extenuating circumstance"

excusing the Branstads' failure to perfect a timely appeal. Moreover, the Branstads point out that the Timeliness Analysis is dated *the same day* as the letter from the NAD notifying them that their appeal was denied as untimely and advising them of their right to request review of the denial based on "extenuating circumstances." Therefore, the Branstads argue that it is clear that the Timeliness Analysis was not prepared as part of the determination of whether they had established "extenuating circumstances" for their failure to perfect a timely appeal. The Branstads argue further that there is no indication that the NAD relied in any way upon the mailing of their notice of appeal to the wrong address in denying their request for consideration of the appeal on the basis of "extenuating circumstances." Nor does the wrong address on their notice of appeal establish the untimeliness of their first notice of appeal, the Branstads argue, because the NAD obviously received subsequent correspondence from the Branstads that was also mailed to the wrong address, and their original notice of appeal has never been returned by the post office as undeliverable, despite the incorrect address. Thus, the Branstads contend that the USDA has not shown that "newly discovered evidence" requires reconsideration and denial of the preliminary injunction.

II. LEGAL ANALYSIS

A. Standards Applicable To The USDA's "Motion To Reconsider"

The court must first determine the basis for the USDA's "motion to reconsider" and the standards applicable to that motion. The USDA cited Rule 60(b) of the Federal Rules of Civil Procedure as the authority for its motion to reconsider, but then relied on the "manifest error" or "newly discovered evidence" standard applicable to a motion to alter or amend a judgment, citing *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir.), *cert. denied*, 488 U.S. 820 (1988). A motion to alter or amend a judgment is made pursuant to Rule 59(e), not Rule 60(b). *See* FED. R. CIV. P. 59(e) ("**(e) Motion to Alter or Amend Judgment**. Any motion to alter or amend a judgment shall be filed no later than

10 days after entry of the judgment.").

Rule 59(e) provides only a deadline for motions to alter or amend, without specifying the standards for alteration or amendment. The Eighth Circuit Court of Appeals, however, has clarified that, under Rule 59(e), the court may alter or amend its judgment only if it finds a "manifest" error of law or fact in its ruling or finds that there is "newly discovered evidence." *See Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir.) (quoting *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir.), *as amended*, 835 F.2d 710 (7th Cir. 1987), quoting in turn *Keene Corp. v. International Fidelity Ins. Co.*, 561 F. Supp. 656, 665-66 (N.D. Ill. 1983), *aff'd*, 736 F.2d 388 (7th Cir. 1984)), *cert. denied*, 488 U.S. 820 (1988); *see also Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998) (stating the same "manifest error" or "newly discovered evidence" standard applicable to Rule 59(e) motions, citing *Hagerman*). This standard is not applicable, however, unless the party's "motion to reconsider" is filed within the time specified in Rule 59(e), because a party's failure to file a timely Rule 59(e) motion eliminates that rule as the basis for the district court's action. *See Spangle v. Ming Tah Elec. Co.*, 866 F.2d 1002, 1003 (8th Cir. 1989); *Sanders v. Clemco Indus.*, 862 F.2d 161, 168 (8th Cir. 1988); *Townsend v. Terminal Packaging Co.*, 853 F.2d 623, 624 (8th Cir. 1988). Indeed, more recently, the Eighth Circuit Court of Appeals has explained that the district court lacks subject matter jurisdiction to consider an untimely Rule 59(e) motion. *See Arnold v. Wood*, 238 F.3d 992, 998 (8th Cir. 2001); *Garrett v. United States*, 195 F.3d 1032, 1033 (8th Cir. 1999). "[T]he ten-day filing period prescribed in Rule 59(e) runs from the entry of judgment, rather than its service upon the parties." *Arnold*, 238 F.3d at 995 n.2 (citing *FHC Equities, L.L.C. v. MBL Life Assurance Corp.*, 188 F.3d 678, 681-82 (6th Cir. 1999) (collecting cases)). Here, the USDA's "motion to reconsider" was not filed until June 29, 2001, more than ten days after the filing of the June 5, 2001, preliminary injunction it asks the court to "reconsider."

On the other hand, a motion for relief from a judgment or order can be brought

pursuant to Rule 60(b), the rule upon which the USDA also appears to rely. Moreover, Rule 60(b) provides that "[o]n a motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding," *inter alia*, because of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." FED. R. CIV. P. 60(b)(2). Also, a "motion to reconsider" under Rule 60(b)(2) is not subject to the ten-day requirement of Rule 59(e), but instead "shall be made within a reasonable time . . . not more than one year after the judgment, order, or proceeding was entered or taken." *Id.* at 60(b). Thus, the USDA's "motion to reconsider" is timely under Rule 60(b). Also, a preliminary injunction is subject to reconsideration under Rule 60(b)(2), because it is a "final judgment" within the meaning of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 54(a) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies."); 28 U.S.C. § 1292(a) ("[T]he courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions[.]").

However, the standard applicable to Rule 60(b) motions is not "manifest error." Instead, Rule 60(b) "'provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances.'" *Sanders*, 862 F.2d at 169 n.14 (quoting *United States v. Young*, 806 F.2d 805, 806 (8th Cir. 1986) (*per curiam*), *cert. denied*, 484 U.S. 836 (1987)); *see also United States v. One Parcel of Property Located at Tracts 10 & 11 of Lakeview Heights*, 51 F.3d 117, 120 (8th Cir. 1995) ("A district court should grant a Rule 60(b) motion 'only upon an adequate showing of exceptional circumstances.'") (also quoting *Young*); *Mitchell v. Shalala*, 48 F.3d 1039 (8th Cir. 1995) ("Generally, Rule 60(b) provides for extraordinary relief, which may be granted only upon a showing of exceptional circumstances."); *Atkinson v. Prudential Property Co., Inc.*, 43 F.3d 367 (8th Cir. 1994) (also quoting *Young*); *Schultz v. Commerce First Fin.*, 24 F.3d 1023, 1024 (8th Cir. 1994)

(also quoting *Young*); *Robinson v. Armontrout*, 8 F.3d 6 (8th Cir. 1993) (also quoting *Young*); *Reyher v. Champion Int'l Corp.*, 975 F.2d 483, 488 (8th Cir. 1992) (Rule 60(b) provides for extraordinary relief which may be granted only on adequate showing of exceptional circumstances). While relief under the rule is "extraordinary," a Rule 60(b) motion is "committed to the sound discretion of the trial court." *MIF Realty L.P.*, 92 F.3d at 755. As the Eighth Circuit Court of Appeals explained,

> Rule 60(b) is to be given a liberal construction so as to do substantial justice and "'to prevent the judgment from becoming a vehicle of injustice.'" *Id.* (quoting *United States v. Walus*, 616 F.2d 283, 288 (7th Cir. 1980)). This motion is grounded in equity and exists "to preserve the delicate balance between the sanctity of final judgments . . . and the incessant command of a court's conscience that justice be done in light of all the facts." *Id.* (internal quotations omitted) (alterations in original). *See also* 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 2857, at 255 (2d ed. 1995) ("Equitable principles may be taken into account by a court in the exercise of its discretion under Rule 60(b).").

MIF Realty L.P., 92 F.3d at 755-56. Although Rule 60(b) motions are "disfavored," the Eighth Circuit Court of Appeals has also "recognize[d] that they 'serve a useful, proper and necessary purpose in maintaining the integrity of the trial process, and a trial court will be reversed where an abuse of discretion occurs.'" *Id.* at 755 (quoting *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 515 (8th Cir.), *cert. denied*, 469 U.S. 1072 (1984)). An "abuse of discretion" occurs "if the district court rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions." *Id.* (internal quotation marks omitted) (quoting *Hosna v. Groose*, 80 F.3d 298, 303 (8th Cir. 1996), *cert. denied*, 519 U.S. 860 (1996), in turn quoting *International Ass'n of Machinists & Aerospace Workers v. Soo Line R.R.*, 850 F.2d 368, 374 (8th Cir. 1988) (*en banc*), *cert. denied*, 489 U.S. 1010 (1989)).

Where a Rule 60(b) motion is premised on "newly discovered evidence," ground

(b)(2), to satisfy the "exceptional circumstances" requirement, the evidence must be "sufficient to justify setting aside the original judgment." *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, 498 (8th Cir. 2001). Moreover, "Rule 60(b) permits consideration only of facts which were in existence at the time of trial, not opinions, which can be formulated at any time." *Id.* (citing *Lapiczak v. Zaist*, 54 F.R.D. 546, 548 (D. Vt. 1972), which held that witness opinions developed after trial were not permitted under Rule 60(b)(2)). Therefore, "[i]n order to prevail under Rule 60(b)(2), the movant must show that: (1) the evidence was discovered after trial; (2) due diligence was exercised to discover the evidence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence is such that a new trial would probably produce a different result." *Schwieger v. Farm Bureau Ins. Co. of Nebraska*, 207 F.3d 480, 487 (8th Cir. 2000) (citing *Mitchell v. Shalala*, 48 F.3d 1039, 1041 (8th Cir. 1995)).

B. Application Of The Applicable Standards

1. Due diligence

In the present case, the court is not altogether convinced that the "newly discovered evidence" of the Timeliness Analysis meets the second requirement for relief under Rule 60(b)(2), due diligence exercised to discover it. *Id.* Although the USDA had been granted an extension of time to answer the Branstads' complaint for judicial review on the ground that the USDA needed additional time to compile and certify the administrative record, and counsel for the USDA notified the court before the hearing on the preliminary injunction that she did not yet have the administrative file and did not expect to receive it before mid-June, counsel did not seek a continuance of the preliminary injunction hearing on that ground. The court is well aware, from copious experience, that administrative agencies often take a substantial—often inordinate—amount of time to recover and produce records pertinent to judicial review actions. However, the USDA's present motion to reconsider does not identify for the court what, if any, efforts were made to expedite recovery of the

administrative file for counsel's use during the preliminary injunction hearing. Nevertheless, the court does not rely on deficiencies with regard to the "due diligence" requirement for relief under Rule 60(b)(2), but instead finds more fundamental deficiencies, discussed below.

2. Evidence that would probably produce a different result

The court concludes that the USDA cannot satisfy the requirement that "the evidence is such that a new trial"—that is, a new hearing on the Branstads' motion for a preliminary injunction—"would probably produce a different result." *Schwieger*, 207 F.3d at 487.[1] This conclusion is based, in the first instance, upon a comparison of the Timeliness Analysis and the decision by the agency denying the Branstads' request for consideration of their untimely administrative appeal.

The Timeliness Analysis mentions the incorrect address only as follows, "Also noted is the attorney's use of *2909* Purdue Road, instead of 8909." Defendant's Motion To Reconsider, Exhibit A (Timeliness Analysis) (emphasis in the original). Although this reference is in the paragraph discussing correspondence from the Branstads' attorney dated January 23, 2001, neither the letter of January 23, 2001, nor any of the documents attached to it bore the incorrect address, *see* Plaintiff's Motion For Preliminary Injunction, Attachment G (letter of January 23, 2001, with enclosures); rather, the letter of January 23, 2001, is correctly addressed to 8909 Purdue Road. Documents bearing the incorrect address are the Branstads' attorney's letter of January 12, 2001, and the unsigned copy of Edward Branstad's November 9, 2000, "Request For Hearing." *See* Defendant's Motion To Reconsider, Exhibits C & D. Thus, the court's reading of the Timeliness Analysis is that the failure of the January 23, 2001, submission from the Branstads' attorney to demonstrate a timely appeal resides not in use of an incorrect address on that letter or its enclosures, but

[1]For the same reasons, discussed in the body of this decision, the court also concludes that the "newly discovered evidence" is not, in fact, "material." *See Schwieger*, 207 F.3d at 487 (third requirement for relief under Rule 60(b)(2)).

in that there is "no mention or indication of an appeal request on any of the documents." Timeliness Analysis, ¶ 4. Indeed, the Timeliness Analysis gives little or no hint that the fatal flaw in the Branstads' appeal was in mailing their request for an appeal to the incorrect address; instead, the Timeliness Analysis states that "[t]here was no documentation provided that verifies a valid and timely appeal request," and that "[t]here were 64 days used" before "a complete appeal request was received." Timeliness Analysis, ¶¶ 5-7.

Even assuming the gist of the Timeliness Analysis was that the appeal request was mailed to the wrong address, never received, and was therefore untimely—an inference poorly, if at all, supported by the text of the Timeliness Analysis itself—such a reason is not reflected in the February 13, 2001, NAD decision denying the Branstads' request for consideration of their administrative appeal. The February 13, 2001, decision states, in pertinent part, the following:

> The Director, National Appeals Division, considered your letter of February 1, 2001. Unfortunately, the circumstances you raise do not establish good cause to relieve Mr. Branstad from the requirement of our rules. It is reasonable that a representative seeking to file appeals would check such for filing requirements, and as the appeal in this instance does not conform to our requirements, it cannot be accepted.
>
> An attorney is ordinarily responsible for knowing published requirements pertaining to the matters for which he or she undertakes a representative role. Our regulations at 7 C.F.R. § Section 11.6(b)(1)(2) are published in the Federal Register at Vo. 64, No. 120, Wednesday, June 23, 1999/Rules and Regulations, and provide that an appeal request "be not later than 30 days after the date on which the participant first received notice of the adverse decision . . ." and "shall be in writing and personally signed by the participant . . ."

Plaintiffs' Motion For Preliminary Injunction, Attachment "J", p. 1. Although the USDA now relies on 7 C.F.R. § 780.8 as establishing the requirement that, to be timely filed, a

request for appeal must be "properly addressed," the regulation expressly relied on in the February 13, 2001, decision as demonstrating that the Branstads' appeal "does not conform to our requirements" instead refers to "thirty-day deadline," "in writing," and "personal signature" requirements. *See id.* Thus, there is no indication in the decision at issue that the Timeliness Analysis figured in the NAD's analysis.

Taking this point further, in its ruling granting the Branstads' motion for a preliminary injunction, the court identified a number of reasons for concluding that the Branstads had sufficient likelihood of success on the merits of their claim that the USDA arbitrarily and capriciously denied their administrative appeal to sustain the court's subject matter jurisdiction—which had been challenged on the basis of failure to exhaust administrative remedies by failing to perfect a timely administrative appeal—and to warrant a preliminary injunction. *See Branstad*, ___ F. Supp. 2d at ___, 2001 WL 630194 at *5-*7. These reasons included the following: (1) the agency applied a "good cause" standard, when the agency had informed the Branstads that the applicable standard was "extenuating circumstances"; (2) the agency's decision did not consider any "extenuating circumstances," but only expressly considered the NAD's rules for timely appeals, and thus addressed the wrong question; (3) the NAD's reliance on the "letter" of its rules indicated that the NAD failed entirely to consider an important aspect of the problem, which was whether there were "extenuating circumstances" for the untimely appeal; (4) there was no indication in the agency's written decision that the agency had considered the Branstads' arguments that their appeal notice had been lost in the mail, thus establishing "extenuating circumstances"; (5) the NAD's determination that there were no "extenuating circumstances" (or no "good cause") was contrary to the evidence presented concerning the Branstads' preparation and mailing of a timely notice of appeal; and (6) there was no rational connection between the facts found in the NAD's decision denying the appeal and the facts demonstrating "extenuating circumstances," such that the decision could not be ascribed simply to a difference in view or agency expertise (indeed, the court found the

agency's decision was "rather bizarre"). *Id.* None of these reasons is substantially undermined by the fact that the agency has "newly discovered evidence" that it had a supposedly colorable basis for denying the untimely appeal, *but never articulated that reason in the pertinent administrative decision*.

The court cannot find, in these circumstances, that the USDA has demonstrated that the Timeliness Analysis is newly discovered evidence that would establish that the results of the preliminary injunction hearing probably would have been different. *Schwieger*, 207 F.3d at 487. Some "secret reason" for agency action should not, after the fact, justify an agency determination that was arbitrary and capricious on the face of the agency's written decision. *See NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-43 (1965) ("[D]ue to the Board's lack of articulated reasons for the decisions in and distinctions among these cases, the Board's action here cannot be properly reviewed. When the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.'") (quoting *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 197 (1941), and also citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-169 (1962); *Interstate Commerce Comm'n v. J-T Transport Co.*, 368 U.S. 81, 93 (1961)); *see also Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 32-33 (1974) (Douglas, J., joined by Stewart, Marshall, and Powell, JJ., dissenting) ("But an agency making decisions has no right to make secret the basis of those decisions, if the [Freedom of Information Act] is to have any real meaning in the activities of the [agency.]"). To hold otherwise would be tantamount to licensing post-hoc justification of whatever an agency decided on a whim it wanted to do in a particular case. Democracy—even that part of executive decisionmaking consigned to administrative processes in this country—depends upon the openness of government decisionmaking and the opportunity for citizens to challenge those government decisions. Similarly, no judicial or quasi-judicial body that is allowed to keep secret its reasons for making a decision involving the claims or contentions

of a citizen can satisfy the American conception of justice.

The USDA argues, to the contrary, that "It appears clear that NAD's decision to deny the plaintiff's request to consider the appeal as timely was primarily based on the Plaintiff's negligence in using the wrong address when sending their request, assuming, for the purposes of argument, that the appeal request was in fact mailed before the deadline." Defendant's Motion To Reconsider at 3. However, as the Branstads argue, the connection between the Timeliness Analysis, which mentions that some correspondence from the Branstads' attorney used the wrong address, and the NAD's decision to deny leave to pursue an untimely appeal is tenuous at best. As the Branstads point out, the Timeliness Analysis was dated January 29, 2001, the same date as the NAD's initial denial of the Branstads' appeal as untimely. Even supposing that the Director of the NAD had available to him the "wrong address" justification the USDA now perceives in the Timeliness Analysis, the articulation of *different* reasons for denying the Branstads' request for consideration of their untimely administrative appeal on the basis of "extenuating circumstances"—albeit reasons that this court found were arbitrary and capricious—can only be taken as the Director's *rejection* of the "wrong address" reason as a justification for the agency's decision. Thus, the newly discovered evidence simply will not generate an inference that the wrong address was the primary reason for the NAD's rejection of the Branstads' request for consideration of their untimely appeal on the basis of "extenuating circumstances." Because it fails to generate the required inference, it patently does not demonstrate that the Timeliness Analysis is evidence such that a new hearing on the Branstads' motion for a preliminary injunction "would probably produce a different result." *Schwieger*, 207 F.3d at 487.

Finally, the USDA places particular emphasis on its argument that the Timeliness Analysis undermines this court's conclusion that it was more likely that the USDA lost the timely notice of appeal than it was that the Branstads' attorney never mailed it. *See Branstad*, ___ F. Supp. 2d at ___, 2001 WL 630194 at *7. The USDA argues that the court's awareness that the notice of appeal was never received because of the Branstads'

negligence in mailing it to the wrong address, and not through fault of the agency, should affect the court's decision on the likelihood of success on the merits. This argument fails, because, even in the absence of a conclusion that the agency was at fault for losing the Branstads' original appeal notice, the NAD's decision on the Branstads' request for consideration of an untimely appeal on the basis of "extenuating circumstances" still (1) did not rely on the Branstads' failure to send the notice of appeal to the proper address, (2) did not consider the Branstads' arguments or evidence that there were "extenuating circumstances" for failing to perfect a timely appeal, and (3) did not consider whether mailing the notice of appeal to the wrong address might itself constitute an "extenuating circumstance." Thus, even if the court were to strike its conclusion that "it appears much more likely to the court that the NAD, rather than the United States Postal Service, lost the Branstads' appeal notice," *see Branstad*, ___ F. Supp. 2d at ___, 2001 WL 630194 at *7, the USDA could not demonstrate that the new evidence "would probably produce a different result." *Schwieger*, 207 F.3d at 487.

III. CONCLUSION

Finding no basis for relief under Rule 60(b), the USDA's June 29, 2001, motion to reconsider is **denied**.

IT IS SO ORDERED.

DATED this 19th day of July, 2001.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA